International Brotherhood of Electrical Workers, Local 357 AFL–CIO *and* Western Diversified Electric *and* International Union of Operating Engineers, Local 12, affiliated with the Building and Construction Trades Department, AFL–CIO. Case 28–CD–259

July 29, 2005

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. The charge was filed on September 9, 2002, by Western Diversified Electric (the Employer), and alleges that International Brotherhood of Electrical Workers, Local 357, AFL–CIO (IBEW) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 12, affiliated with the Building and Construction Trades Department, AFL–CIO (Operating Engineers). The hearing was held on October 8, 2002, before Hearing Officer Winkfield F. Twyman Jr.

The Board affirms the hearing officer's rulings to the extent consistent with this Decision and Determination of Dispute. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is an electrical contractor performing work in Clark County, Nevada. All parties stipulated that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that IBEW and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background

The Employer installs street lighting and traffic signals at traffic intersections throughout Clark County, Nevada. One of the tasks involved is trenching work, i.e., the digging of trenches. Some of that work is performed with heavy equipment.

Since its incorporation in 1992, the Employer has been a signatory to an agreement with IBEW covering so-called outside work. Outside work is electrical work performed over 5 feet away from a building, including street lighting, traffic signals, power lines, and telephone work. During the entire period 1992 to the present, the Employer has assigned its trenching work to its employees represented by IBEW. The work is performed by employees classified under the agreement as heavy equipment operators.

In May 2000, Operating Engineers claimed the trenching work performed by the Employer at the Camino del Norte jobsite. At that time, Operating Engineers had no contractual relationship with the Employer. In response to the claim, the Employer filed a Section 8(b)(4)(D) charge, Case 28–CD–246, against Operating Engineers. Prior to the hearing, however, Operating Engineers disclaimed the work in dispute. In June 2000, the Employer, as a member of the Nevada Contractor's Association, entered into a labor agreement with Operating Engineers for the first time. It remained covered by that agreement at all times relevant to this proceeding.

In December 2001, Operating Engineers again claimed the Employer's trenching work, at the I-15 channel project. Operating Engineers filed a grievance against Las Vegas Paving, the general contractor that had subcontracted the lighting and signal work to the Employer, contending that the work should be performed by employees represented by Operating Engineers. Operating Engineers also threatened to pursue actions against other general contractors, potentially affecting the Employer's ability to obtain work. The Employer informed IBEW that it was considering reassigning its trenching work to Operating Engineers. IBEW responded by stating that it would take economic action against the Employer if the trenching work were reassigned to employees represented by Operating Engineers.

B. Work in Dispute

The work in dispute is the trenching work performed in connection with the installation of street lighting and traffic signals at various traffic intersections throughout Clark County, Nevada.

C. Contentions of the Parties

As an initial matter, Operating Engineers participated at the hearing only long enough to state its claim to the work at issue and to advance certain defenses to the notice of hearing. Its representative withdrew from the hearing before the merits of the dispute were litigated. Operating Engineers did, however, file a posthearing brief.

Operating Engineers asserts that it is entitled to the work under the terms of its agreement with the Nevada Contractor's Association. It contends, however, that the notice of hearing should be quashed, because (1) the

work in dispute was defined in overly broad geographic terms, and (2) all parties to this proceeding are obligated by a jurisdictional dispute resolution mechanism. With respect to the first of those reasons, Operating Engineers contends that Board law disfavors an area-wide award in cases in which the charged party (here, IBEW) represents the employees to whom the work is awarded. With respect to the second reason, Operating Engineers contends that all parties here are bound by the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan), promulgated by the Building and Construction Trades Department of the AFL–CIO, and incorporated into its labor agreement with the Nevada Contractor's Association. Operating Engineers contends that the Plan is binding on all national and international unions affiliated with the AFL–CIO's Building and Construction Trades Department and their local constituent bodies, including both Operating Engineers and IBEW.

IBEW, for its part, admits that it threatened economic action against the Employer if the work in dispute was reassigned to Operating Engineers. IBEW contends, however, that there is no voluntary, agreed-upon method for settling the dispute. Specifically, it contends that it has not agreed to submit jurisdictional disputes for resolution under the Plan. With respect to the merits, it contends that, taking into account the labor agreements, employer preference and past practice, area practice, skills, and economy and efficiency of operations, the work in dispute should be awarded to employees it represents. IBEW requests a broad order.

The Employer, in agreement with IBEW, contends that there is no agreed-upon method of resolving the dispute. It further contends that the facts establish reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. On the merits, it agrees with IBEW that the work should be awarded to employees represented by IBEW. Like IBEW, the Employer also requests a broad order.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. This, in turn, requires a finding that: (1) there are competing claims to the disputed work between rival group of employees, and (2) a labor organization has used proscribed means to enforce its claim to the work in dispute. Before addressing the merits of the dispute, the Board must also find that the parties have not agreed on a method for the voluntary adjustment of the dispute.[1]

We find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. At the hearing, Operating Engineers' Attorney Koppelman stated that the work in dispute had been resolved at the two unions' international level in favor of the Operating Engineers. Operating Engineers has a history of asserting a right to the work in dispute, culminating in its filing of a grievance against the general contractor that subcontracted the work to the Employer, and its threat to take similar action against other general contractors that might do business with the Employer.[2] After Operating Engineers filed its grievance against the general contractor, IBEW made a claim for the work. It informed the Employer that, if the Employer reassigned the work to Operating Engineers, the Employer would incur economic sanctions, specifically strikes and picketing, from IBEW. It is well settled that the threat to cause a work stoppage or engage in other economic reprisals to support a claim for disputed work in these circumstances provides a reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Teamsters Local 179 (USF Holland, Inc.)*, 334 NLRB 362, 363 (2001).

We further find that there is no agreed-upon method for voluntary adjustment of the dispute in this case. Notwithstanding Operating Engineers' contention that the Plan binds both unions, there is no evidence in the record that the Plan applies to IBEW's claim of the work. IBEW claims the work under its outside agreement with the Employer, and that agreement, which is part of the record, makes no reference to the Plan. In addition, IBEW's business manager testified, without contradiction, that the Plan was not applicable to that agreement, but applied only to the inside agreement between IBEW and the Employer, which does not cover the work in dispute. In these circumstances, we find that Operating Engineers' motion to quash should be denied.[3]

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[1] Teamsters Local 259 (Globe Newspaper Co.), 327 NLRB 619, 622 (1999); Laborers Local 113 (Super Excavators), 327 NLRB 113, 114 (1998); Laborers' District Council of West Virginia (Michel, Inc.), 325 NLRB 1058, 1059 (1998).

[2] Operating Engineers has not argued the applicability of *Labors* (*Capital Drilling Supplies)*, 318 NLRB 809, 810 (1995) (union's grievance against general contractor that work has been subcontracted in breach of a lawful union signatory clause does not constitute a claim for the work vis-a-vis the subcontractor).

[3] Operating Engineers first addressed its motion to quash to the hearing officer, who denied it, and it renewed the motion before the Board. The hearing officer erred in ruling on the motion because the issues it raised are appropriately resolved only on a full record after a complete Sec. 10(k) hearing. See *Carpenters Local 558(Joyce Bros. Storage)*, 331 NLRB 1022, 1023 (2000). We find, however, that the hearing officer's ruling did not prejudice any party, because the effect of the

Accordingly, we find that this dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in deciding this dispute.

1. Certification and collective-bargaining agreements

Neither IBEW nor Operating Engineers has been certified to represent any of the Employer's employees. The record establishes, however, that each union has an agreement with the Employer covering the disputed work. Accordingly, we find that the factors of certification and collective-bargaining agreements do not favor awarding the disputed work to either group of employees.

2. Employer Preference and Past Practice

The Employer prefers to assign the work to employees represented by IBEW. In the past, it has always assigned the disputed work to employees represented by IBEW. Accordingly, these factors favor awarding the disputed work to employees represented by IBEW.

3. Area Practice

The Employer presented evidence that, in Clark County, IBEW has historically performed the trenching work related to the installation of street lighting and traffic signals. There was no evidence that Operating Engineers-represented employees perform the disputed work in the area. Accordingly, this factor favors an award of the work in dispute to employees represented by IBEW.

5. Relative Skills

The Employer presented evidence that the work in dispute requires employees to operate certain heavy equipment, and that IBEW-represented employees have the appropriate training and skills to do so. No evidence was presented regarding the skills of the employees represented by Operating Engineers. Accordingly, this factor favors an award of the work in dispute to employees represented by IBEW.

6. Economy and Efficiency of Operations

The Employer presented evidence that it would be more costly if Operating Engineers performed the disputed work because of their higher wage scale. However, in assessing the factors of economy and efficiency of operations, the Board does not consider wages to be relevant. *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB No. 21, fn. 9 (2004), citing *Laborers Local 320 (Northwest Metal Fab & Pipe)*, 318 NLRB 917, 919 fn. 6 (1995); *Bakery Workers Local 205 (Metz Baking Co.)*, 339 NLRB 1095, 1098 (2003), citing *Painters Local 91 (Frank M. Burson, Inc.)*, 265 NLRB 1685, 1687 (1982). In addition, the Employer contends that it would be more efficient to continue to use IBEW-represented employees. In particular, the Employer's project manager testified that the IBEW-represented employees can be assigned other work and perform multiple tasks on jobsites. By contrast, Operating Engineers-represented employees only operate heavy equipment. As a consequence, using Operating Engineer-represented employees would require the Employer to pay them for periods of time when they are not trenching but cannot perform other work. Accordingly, we find that this factor favors awarding the disputed work to employees represented by IBEW.

CONCLUSION

After considering all the relevant factors, we conclude that employees represented by IBEW are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference and past practice, area practice, relative skills, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by IBEW, not to that union or its members.

F. Scope of the Award

The Employer and IBEW requested that the Board issue a broad award assigning the disputed work to IBEW-represented employees for all future work. Usually, however, 10(k) awards are limited to the jobsite or jobsites where the unlawful 8(b)(4)(D) conduct occurred or was threatened. There are two prerequisites for a broader award: (1) there must be evidence that the work in dispute has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur; and (2) there must be evidence demonstrating the charged union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute. See, e.g., *Laborers International (Paschen Contractors)*, 270 NLRB 327, 330 (1984) (citing *Electrical Workers*

ruling was to allow the parties to proceed to the hearing and to develop a record.

IBEW Local 104 (Standard Sign), 248 NLRB 1144, 1147–1148 (1980)).

Here, although the IBEW stated it would take economic action regarding this dispute, there is no evidence that it has a proclivity to engage in unlawful conduct of this nature, or that it would do so in the future to obtain work similar to the work in dispute. Moreover, as Operating Engineers contends, the Board customarily declines to grant a broad, area-wide award in cases where the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See *Pipefitters Local 562 (Systemaire, Inc.)*, 321 NLRB 428, 431 (1996), and cases cited. Accordingly, our award will be limited to the controversy at the jobsites that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute:

Employees of Western Diversified Electric, Inc., who are represented by International Brotherhood of Electrical Workers, Local 357, AFL–CIO, are entitled to the trenching work at the jobsites that gave rise to this proceeding.

Dated, Washington, D.C. July 29, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD